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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 952.

MARYLAND CASUALTY COMPANY,
Petitioner,

vs

HARRY H. HALLATT, Individually and as Executor of the Estate of MARY VALENTINE HALLATT, Deceased,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

LAWRENCE G. ROPES, JR.
218 Alcazar
Coral Gables, Florida
Attorney for Respondent

KELLY, BROOKS & ROPES
218 Alcazar
Coral Gables, Florida
Of Counsel

L. MERSON & CO., INC., 115 Cedar Street, Dade Co., Miami, Fla.

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STATEMENT OF THE CASE.

Introduction.

The petition for writ of certiorari brings here for review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, entered January 10, 1964, reported at 326 F. 2d 275, in which the Court vacated and set aside its former opinion and judgment (295 F. 2d 64) entered on October 6, 1961 and reinstated the judgment of the lower court entered June 17, 1960.

Identity of Parties and Record References.

For convenience, we will refer to the garnishee in the court below (Maryland Casualty Company) as "the petitioner" and to the plaintiffs in the court below as "the respondent". All reference to the transcript of record will be preceded by the designation "R" and references to the appendix to petitioner's brief will be preceded by the designation "A".

THE FACTS.

HARRY H. HALLATT and MARY VALENTINE HALLATT, his wife (now deceased) brought a writ of garnishment against MARYLAND CASUALTY COMPANY to satisfy a personal injury judgment in the sum of $9,267.52. The garnishment action was tried in the United States District Court for the Southern District of Florida, which had jurisdiction by reason of diversity of citizenship. The action sought to reach the proceeds of an automobile liability policy issued by Maryland to the judgment debtor, James R. Richardson. Maryland contended that Richardson's (the insured) noncooperation in failing to attend the trial of the personal injury suit voided the coverage. The garnishment case was tried on the theory that the case law of Florida provided that Maryland was required to show proof of prejudice by the insured's noncooperation in order that it might be relieved of liability. The Court of Appeals for the Fifth Circuit, on October 6, 1961, by a 2 to 1 majority opinion, held that the case was tried on an erroneous theory of law as to the necessity of proof by Maryland that it was prejudiced by the absence of the insured for the trial, and reversed the judgment (A 26), holding that the noncooperation was prejudicial as a matter of law. In order to so hold, it was necessary for the Court of Appeals to declare three pronouncements of the Courts

of Florida theretofore written as "mere obiter dictum" (A 18) insofar as they purportedly upheld the theory that material prejudice must be shown. This Court denied certiorari March 19, 1962 (82 S. Ct. 830, 369 U.S. 819, 7 L. Ed. 2d 785).

The cause was remanded to the U.S. District Court for the Sonthern District for a new trial solely on the issues of the good faith and diligence of Maryland in making efforts to procure the attendance of Richardson at the trial and whether or not Richardson's absence from the trial was excusable or justifiable (A 24, 25). The issue of prejudice was removed from consideration of the trial court on retrial by the pronouncement of the Appeals Court. On retrial under the issues made by the Appeals Court, judgment was rendered for Maryland on August 29, 1962, from which the respondent appealed on October 16, 1962 (R 6, 146).

After rendition of the judgment and during the pendency of the appeal, the District Court of Appeals for the Third District of Florida rendered its decision in *Barnes* v. *Threshermen and Farmers Mutual Casualty Insurance Company*, on November 5, 1962, reported in *146 So. 2d 119* (Cert. Den. *153 So. 2d 305* on March 28, 1963) (P 164 A 2). Then the Florida Court categorically and by name rejected the opinion of the United States Court of Appeals for the Fifth Circuit in the first *Hallatt case (295 F. 2d 64)* and *specifically adopted the dissenting opinion as correctly enunciating the law of Florida as it was at the time of the jury verdict in the lower court entered on June 17, 1960* (A 2, 3).

On January 7, 1963 the respondent filed his Motion for Reconsideration of the initial decision of the Court of Appeals in case No. 18485, to which the petitioner filed a reply on January 17, 1963.

On February 8, 1963 the Court of Appeals, by Order, denied the Motion for Reconsideration as filed in case No. 18485 but stated that the question raised by the Motion could be presented and considered in the present appeal No. 20197 pending before that Court.

On February 19, 1963 the respondent filed his Motion for Abatement of Appeal and/or Reconsideration in the Court of Appeals case No. 20197 (A 2).

On March 13, 1963 the said Court of Appeals granted the Motion of the respondent for a postponement of the hearing of the appeal in case No. 20197 until after a final decision in the case of *Barnes* v. *Pennsylvania Threshermen and Farmers Mutual Casualty Insurance Company, 146 So. 2d 119* by the Supreme Court of Florida.

On April 3, 1963 the respondent filed his Supplement to the Motion for Abatement of Appeal and/or Reconsideration, bringing to the Court's attention the decision of the Supreme Court of Florida denying certiorari in the Barnes case, supra, entered March 28, 1963, to which Motion the petitioner replied, and on May 21, 1963 the Court of Appeals denied abatement and postponed the respondent's Motion for Reconsideration of that Court's opinion in the prior appeal in that Court, case No. 18485, pending a hearing by the Court of case No. 20197. Thereafter, appellate briefs for both sides were duly filed.

The Court of Appeals, in view of that court's decision in *Connor* v. *New York Times Co., 1962, 310 F.2d 133*, on November 19, 1963 requested further briefs from the parties to appeal No. 20197 as to whether the previous decision (Case No. 18485) was binding as the law of the case in the light of the Barnes decision, supra, and called respective counsel's attention to that court's Order postponing the Motion for Reconsideration of that court's opinion in the prior appeal, No. 18485, pending a hearing of No. 20197.

Thereafter, supplemental briefs were filed by all parties, and on December 6, 1963, the pending Motion and the appeal came on to be heard (A 2, 3, 4, 5).

The Court of Appeals On January 10, 1964, after considering the Motion for Reconsideration granted same, thus making further consideration of the appeal in No. 20197 moot. (A 2-5)

REASONS FOR THE DENIAL OF THE WRIT.

In response to petitioner's reason for allowance of the writ, the following is submitted.

As a general rule the decision of an Appellate Court in a case establishes the law of the case, not only for trial upon remand, but also for the appellate court itself upon subsequent review. But this rule is not an inexorable command, and must not be used to accomplish an obvious injustice. United States v. Ohio Power Co., 353 U.S. 98; Messenger v. Anderson, 225 U.S. 436; Johnson v. Cadillac Motor Co., (1919, C.A. 2 N.Y.) 261 F. 878, 8 A.L.R. 1023; Luminous Unit Co. v. Freeman-Sweet Co., (1924, C.A. 7 Ill.), 3 F. 2d 577; Sedalia ex rel. Ferguson v. Shell Petroleum Corp., (1936, C.A. 8, Mo.) 81 F. 2d 193, 106 A.L.R. 1327 (stating that the doctrine of the law of the case as applied to successive appeals, is not an absolute rule of law, but rather a rule of practice or procedure); Cochran v. M. & M. Transp. Co., (1940, C.A. 1 R.I.) 116 F. 2d 519; Kaku Nagano v. Brownell, (1954, C.A. 7, Ill.) 212 F. 2d 262 (recognizing that the doctrine of the law of the case is not an "ironclad rule"). (A 3)

The Appellate Court in its decision (A 3) recognized that its power to depart from its own ruling on a former appeal should be exercised sparingly and only in excep-

tional cases. However, that court determined that this was an exceptional case, the litigation had not yet terminated, and the initial error was its misapplication of governing state law.

As the appellate court said (A 4):

> "This Court has jurisdiction of and will correct an initial opinion where as here, between the date of the initial decision and the time we are again called upon to pass upon the same case, a controlling state court has made a decision that we were 'dead wrong'. The Florida Court in Barnes has saved us from committing a miscarriage of justice. . . ."

The United States Court of Appeals for the Fifth Circuit itself has adhered to this doctrine in the case of *Commercial National Bank in Shreveport* v. *Connelly*, *176 Fed. 2d 1004*, wherein the court said at *page 1006*:

> "A doctrine of the law of the case usually raises a disinclination on the part of an appellate court to re-examine its own prior legal pronouncements in a case, but the doctrine does not destroy its power to do so." (Messenger v. Anderson, 225 U.S. 436, 32 S. Ct 739, 56 L. Ed. 1152; Texas Company v. Pensacola Maritime Corp., 5 Cir. 292 Fed. 61; and Hotel Markham, Inc., et al v. Ball, 5 Cir. 131 Fed. 2d 424).

It is noted that the Fifth Circuit Court in the aforesaid case cited with approval the case of *Messenger* v. *Anderson, 225 U.S. 436, 32 S. Ct. 739, 56 L. Ed. 1152*, on writ of certiorari from U.S. Court of Appeals, 6 Circuit. The Circuit Court of Appeals, in a Will case first held that James Anderson took only a life estate in certain property. Pending these proceedings another case was tried in the state court between the same parties covering different lands but depending on the same title, in which it was found by the lower court and affirmed on writ of error

to the Supreme Court of Ohio that James Anderson took a fee. The Supreme Court held:

> "The judgment of the lower court was pleaded but it was held by the Circuit Court of Appeals, after the affirmance by the Supreme Court, that its own previous decision was the law of the case, and that it was not at liberty to reverse the judgment even if the matter was res judicata. * * * In the absence of statute the phrase 'law of the case' as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided not a limit to their power. * * * Of course this court, at least, is free when the case comes here. * * * In our opinion, even apart from the effect of the state judgment as an adjudication, it should have been followed, if for no other reason, because, at least, as against the decision of the circuit court of appeals it was right."

The right of that court to reverse itself in such an instance was again affirmed by that court in the case of *Seagraves v. Wallace, 69 Fed. 2d 163 5 Cir.*, wherein the court said:

> "An appellate court, so long as it has jurisdiction over the controversy ought to have power to do justice according to law, and should be more ready to correct its own previous error, if such clearly appears, than to correct the errors of the District Court. Justice is better than consistency. The court is not bound at the will of litigants to revise its previous holdings, but, when itself convinced that it should, it can. It may not say stare decisis but fiat justicia ruat coelum. Johnson v. Cadillac Motor Co., C.C.A. 261 F. 878, 879, ALR 1023, Higgins v. California Prune and Apricot Grower, 3 Fed. 2d 896; Luminous Unit Co. v. Freeman-Sweet Co., 3 Fed. 2d 577." (To same effect, Atchison T. & S. Fe Railway Co. v. Bollard, 5 Cir. 108 Fed. 2d 768) (parentheses supplied)

Finally, the State of Florida itself is committed to this doctrine as is evidenced by the statements of the Supreme Court of Florida in the case of *Beverly Beach Properties v. Nelson, 68 So. 2d 604, 41 ALR 2d 1071;* cert. den. *Rensta v. Beverly Beach Properties, Inc., 348 U.S. 816 99. L. Ed. 643, 75 S. Ct. 27,* wherein Justice Hobson, speaking for the Supreme Court of Florida, said, at *pages 607, 608:*

> "This is the same suit and we have not lost jurisdiction thereof. Consequently, we have the power to correct any error which the Chancellor or we may have heretofore made in the progress of this litigation. There is no question of res adjudicata because this is the same, not a new and different suit. However this Court, among others, has gone so far as to hold that it will not invoke the doctrine of res adjudicata if to do so would work injustice. The propriety of such ruling can not be questioned when one reflects upon the fact that the primary purpose for which our courts were created is to administer justice. In the case of Wallace v. Luxmoore, 156 Fla. 725, 24 So. 2d 302, 304, we said:
>
> " 'Stare decisis and res adjudicata are perfectly sound doctrines, approved by this court, but they are governed by well-settled principles and when factual situations arise that to apply them would defeat justice we will apply a different rule. Social and economic complexes must compel the extension of legal formulas and the approval of new precedents when shown to be necessary to administer justice. In a democracy the administration of justice is the primary concern of the State and when this cannot be done effectively by adhering to old precedents they should be modified or discarded. Blind adherence to them gets us nowhere.'
>
> "A Court should have less hesitancy in changing 'the law of the case' before losing jurisdiction than it would have in refusing to apply the doctrine of res adjudicata when all the requisites thereof are present.

> We may change 'the law of the case' at any time before we lose jurisdiction of a cause and will never hesitate to do so if we become convinced, as we are in this instance, that our original pronouncement of the law was erroneous and such ruling resulted in manifest injustice. In such a situation a court of justice should never adopt a pertinacious attitude."

The error assumed by the petitioner is that the Barnes case, supra, introduced a new theory of law, whereas in truth and in fact, it reaffirmed the law as it existed at the time of the initial jury decision on June 17, 1960.

CONCLUSION.

It is respectfully submitted that the Appellate Court had the right to entertain the Motion for Reconsideration and had the right to correct its own errors.

For the foregoing reasons Writ of Certiorari should be denied.

Dated: April ....., 1964.

Respectfully submitted,

LAWRENCE G. ROPES, JR.
218 Alcazar
Coral Gables, Florida 33134
Attorney for Respondent

KELLY, BROOKS & ROPES
218 Alcazar
Coral Gables, Florida 33134
Of Counsel

CERTIFICATE OF SERVICE.

I hereby certify that on this ..... day of April, 1964 a true and correct copy of the foregoing Brief of Respondent in Opposition to Petition for Writ of Certiorari was mailed to Dewey Knight, Esquire, Attorney for petitioner, Knight, Smith, Underwood & Peters, 807 Ingraham Building, Miami, Florida.

.....

LAWRENCE G. ROPES, JR.